NO. 21518

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

OSCAR JOHN HUGUEZ,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

EDWIN L. MILLER, JR.,
United States Attorney,
PHILLIP W. JOHNSON,
Assistant U.S.Attorney,

325 West "F" Street,
San Diego, California 92101,

Attorneys for Appellee,
United States of America.

NO. 21518

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

OSCAR JOHN HUGUEZ,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

EDWIN L. MILLER, JR.,
United States Attorney,
PHILLIP W. JOHNSON,
Assistant U.S.Attorney,

325 West "F" Street,
San Diego, California 92101,

Attorneys for Appellee,
United States of America.

TOPICAL INDEX

TABLE OF AUTHORITIES

NO. 21518

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

OSCAR JOHN HUGUEZ,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Southern District of California, adjudging appellant to be guilty as charged in two counts of a four-count indictment, following a non-jury trial [C.T. 2-5, 28].[1]

The offenses occurred in the Southern District of California. The District Court had jurisdiction by virtue of Title 18, United States Code, Sections 2, 1407, and 3231, and Title 21, United

---

1 "C.T." refers to the Clerk's Transcript.

States Code, Section 174. Jurisdiction of this Court rests pursuant to Title 28, United States Code, Sections 1291 and 1294.

II

STATEMENT OF THE CASE

Appellant was charged in three counts of a four-count indictment returned by the Federal Grand Jury for the Southern District of California. The first count alleged that appellant knowingly imported and brought approximately four ounces of heroin, a narcotic drug, into the United States from Mexico, and that Richard Paul Baros knowingly aided, abetted, counseled, induced, and procured the commission of that offense [C.T. 2].

The second count alleged that appellant knowingly concealed, and facilitated the transportation and concealment of, approximately four ounces of heroin, which, as he then and there well knew, had been imported and brought into the United States contrary to law, and that Richard Paul Baros knowingly aided, abetted, counseled, induced, and procured the commission of that offense [C.T.3].

The third count charged Baros with failure to register under 18 U.S.C.A. 1407. The fourth count alleged that appellant entered, and attempted to enter, the United States without registering under 18 U.S.C.A. 1407, being a citizen of the United States who had a prior narcotics conviction and was a narcotics addict and

user [R.T. 4-5].

Court trial of appellant commenced on May 26, 1966, before United States District Judge Fred Kunzel [R.T. 25-27].[2] Appellant's Motion to Suppress Evidence was heard and denied during the trial. Appellant was found guilty as charged in the first two counts on May 26, 1966 [R.T. 134]. The fourth count was dismissed [C.T. 28].

On July 25, 1966, appellant was sentenced to the custody of the Attorney General for seven years upon each of the first two counts, to run concurrently, with a recommendation that the Attorney General designate a state institution as the place of confinement [C.T. 28].

Thereafter, appellant filed a timely notice of appeal [C.T. 29].

III

ERROR SPECIFIED

The only error specified on appeal is the denial of the motion to suppress evidence which allegedly was unlawfully seized.

IV

STATEMENT OF THE FACTS

Appellant entered the United States from Mexico with one companion on March 13, 1966. The entry was made in San Diego County, California [R.T. 75-76]. The two men declared no narcotics to the United States Customs inspector, Thomas N. Teela,

---

2 "R.T." refers to the Reporter's Transcript on Appeal.

who met them at the primary inspection point [R.T. 75.77].

Inspector Teela, who had been a Customs inspector at San Ysidro for eight years and had had experience in observing narcotics suspects during that period, observed that appellant's eyes, and those of his companion, appeared to be pinpointed and glassy. Appellant "appeared to be under the influence of narcotics." [R.T. 77-78, 81].

Appellant was searched in a secondary area search room. His rectal area appeared to contain a greasy substance [R.T. 78-79]. Appellant was taken across the street to the doctor's office, which was at the port of entry at San Ysidro, California. Dr. Paul R. Salerno examined appellant [R.T. 28, 31, 89].

Dr. Salerno, who was licensed to practice medicine in the state of California, testified concerning his academic training and subsequent experience in the examination of suspected narcotics users [R.T. 28-30]. He reached the opinion that appellant was a user of narcotics who was then under the influence of a narcotic drug [R.T. 31-32].

After this opinion was reached, Dr. Salerno was requested to conduct a rectal examination to determine whether concealed material was in the rectal cavity. Dr. Salerno employed a lubricated gloved finger and located four large packets in the rectal cavity. This examination was similar to the rectal examination

that is part of any complete physical examination for an adult male. These packets were gently extricated. It was stipulated that the packets contained approximately four ounces of heroin [R.T. 33-37].

The examination and the removal of the packets were accomplished in a medically-approved manner. Appellant began to resist as soon as the material was palpated, and it was necessary for agents to forcibly restrain him while the packets were removed. No blows were struck, and there was no bleeding [R.T. 34, 46, 61, 74, 93].

Dr. Salerno testified that in the absence of voluntary resistance by contraction of the external sphincter of the anus, the removal of the packets "would not be expected to be any more uncomfortable than that experienced with a constipated or hard bowel movement." He also testified that the introduction of such packets into the rectal cavity would be expected to involve greater discomfort than their removal, provided that resistance was not offered in either case [R.T. 39-41].

He also testified that there would be a mechanical and chemical attack upon the rubber containers in the rectum over a period of time; that the release of the heroin into the rectum could result in death; and that leaving the packets in the rectum for more than six to eight hours "would certainly be hazardous." [R.T. 42-43]. He testified that a man in a prison cell might possibly hold the object

in his rectum for several days; that it would take approximately eight to ten hours for an oral laxative to achieve effective results; that there is a health hazard involved in taking laxatives; that an X-ray machine or a fluroscope would not permit differentiation between the package materials and normal fecal contents; that X-ray machines and fluoroscopes should be operated only by radiologists; that no radiologist was available. [R.T. 44-46].

After the packets were removed, appellant admitted that he had been sent from Los Angeles to pick up the heroin and that he had secreted it in his rectum. He did not complain of any injuries [R.T. 97-98, 106].

Appellant testified that he resisted the search; that he had a slight cut on his wrists from handcuffs employed during the search; and that he had inserted the objects into his rectum with soap and water, not grease [R.T. 113-116].

Between July 1, 1965 and May 26, 1966, there were 20 seizures of narcotics from body cavities [R.T. 122].

The motion to suppress evidence was denied. The Court stated that where there is a well-founded suspicion that a person crossing the border is using narcotics, "it follows almost as night follows day that he is carrying narcotics somewhere, because the supply is easy to get in Tijuana, it is cheap, and they are going to bring it across." [R.T. 132-34].

Since appellant's affidavit in support of the motion to suppress evidence was not received in evidence upon the hearing of the motion, no attempt has been made here to emphasize the discrepancies between the affidavit C.T. 18-20 and the testimony of eyewitnesses.

V

ARGUMENT

A. The Evidence Was Obtained In A Reasonable Manner.

Appellant maintains that the officers should have obtained a search warrant before asking a physician to examine appellant's rectum. However, he also claims that there was insufficient probable cause to obtain a search warrant (Appellant's Brief, pp. 12-14, 26).

Since probable cause to believe that a person is smuggling narcotics in a body cavity will rarely if ever, be obtained in the absence of a confession by the smuggler or a conspirator, appellant is suggesting that the Constitution of the United States requires that the barriers to unrestricted importation of narcotic poisons, small espionage materials, and other small items be swept away. Perhaps the United States would then become the first great nation in history to provide a free license to smugglers who use the body cavities.

To borrow the language of Judge Barnes in Rivas, supra, "We again are faced with the practical problem: must the people of the

United States permit the wholesale introduction of narcotic drugs into the United States?"

Fortunately, probable cause has never been required for a border search. It also is not required for rectal border searches.

Rivas v. United States, 368 F. 2d 703, 709 (9th Cir. 1966;

Murgia v. United States, 285 F. 2d 14, 17 (9th Cir. 1960).

Rectal searches similar to the one performed in the instant case have been repeatedly upheld by this Court.

Blackford v. United States, 247 F. 2d 745 (9th Cir. 1957);

Murgia v. United States, supra;

Denton v. United States, 310 F. 2d 129 (9th Cir. 1962);

Morgan v. United States, 340 F. 2d 125 (9th Cir. 1965);

Rivas v. United States, 368 F. 2d 703 (9th Cir. 1966);

Spears v. United States, 370 F. 2d 335 (9th Cir. 1967);

There is a remarkable similarity between the facts of the instant case and the factual situation in Rivas, supra. However, appellant attempts to distinguish Rivas upon each of the following grounds:

(1) Rivas registered under 18 U.S.C.A. 1407, while appellant did not.

(2) Rivas was nervous.

(3) Rivas refused to cooperate during the "strip search."

The fact that appellant failed to register, although he was a

user of narcotics, was a highly-suspicious circumstance that added to the weight of the officers' belief that a rectal search was necessary. The most likely motive for failing to register and thereby risking a felony arrest would be the desire by the offender to avoid attention by not registering, because special attention might lead to discovery of smuggled narcotics, as it did in Rivas.

The fact that Rivas was nervous was a small matter in comparison with the highly-significant fact that appellant Huguez's rectal area appeared to contain a greasy substance [R.T. 78-79]. Appellant minimizes this factor upon the assumption (not clear from the record) that none of the inspectors informed Agent Gates that the greasy substance was observed. However, it is highly probable that the greasy appearance of the rectal area played a role in the decision to have appellant examined by a physician. Appellant states that in Blackford, supra, Blackford's admission and the grease upon his buttocks provided "two very good reasons for concluding that there was heroin in his rectum." (Appellant's Brief, p.28).

While appellant emphasizes the fact that Rivas refused to cooperate during the "strip search", giving rise to the inference that there was something there that he did not want the agents to see, "which gave rise to the further inference that he was carrying contraband in his rectum"[3], the facts herein would lead to a

---

[3] Appellant's Brief, p.38

similar inference, for appellant testified that he objected to the removal of his clothes at the time of the first search and then objected to the request that he bend down [R.T.111].

To summarize, there is a close similarity between the facts of Rivas and the facts of the instant appeal. In each case, the suspect was under the influence of narcotics. In each case, the suspect objected to the original searchroom procedure .

Appellant contends that while urgent action was necessary in Rivas , immediate search of appellant was not necessary because he was subject to arrest under 18 U.S.C.A. 1407 (for failure to register) and could have been held until a search warrant was obtained. (Rivas actually was arrested under 18 U.S.C.A. 111 before the rectal examination was made). Appellant's argument is inconsistent with his assumption that the total information received by Agent Gates from the inspectors consisted of the statement that "both men had needle marks on their arms." (Appellant's Brief, pp. 25-26, footnote 18). If Agent Gates was told no more, how did he know that appellant failed to register or that he was a citizen of the United States?

More importantly, appellant's argument again assumes that a search warrant is required, adding a probable cause requirement that is utterly at variance with existing law relating to border searches.

Had appellant been arrested, he would have had the right to

post bail immediately.

Appellant cites Blefare, v. United States, 362, F. 2d 870 (9th Cir. 1966), to support the proposition that "Some knowledge of the presence of narcotics" is necessary (Appellant's Brief, p. 27). However, Blefare involved a stomach search. Blefare, like Schmerber v. United States, 384 U.S. 757 (1966) (forcible extraction of blood), also cited by appellant, involved conduct far more serious than the mere rectal probe involved in this case.

Appellant also cites Cervantes v. United States, 263 F. 2d 800 (9th Cir. 1959). However, Cervantes did not involve a border search, so the decision was based upon a probable cause requirement not present in border searches.

VI

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment in the Court below should be affirmed.

Respectfully submitted,

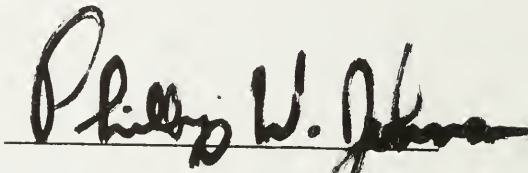
EDWIN L. MILLER, JR.,
United States Attorney,

PHILLIP W. JOHNSON,
Assistant U. S. Attorney,

Attorneys for Appellee,
United States of America.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



PHILLIP W. JOHNSON,
Assistant U. S. Attorney